THE CHANGE OF THE PROPERTY IN GOODS BY SALE IN MARKET OVERT.

I fear the subject of this paper is not of much practical importance to American lawyers, as I understand that the Courts of the United States have not adopted that part of the English Common Law with which it deals. Nevertheless, I venture to think what follows may prove of some interest to the readers of this REVIEW, possibly of more interest than if the subject-matter were one frequently occurring in daily practice.

The general rule of the common law is that the purchaser of a chattel takes it subject to what may turn out to be infirmities in its title; a seller can give no better title than he himself has. To this rule there are well known exceptions, in the case of sale of goods in market overt and in the case of transfer of negotiable instruments.[1] The first exception is thus declared by sec. 22 (1) of the Sale of Goods Act, 1893:[2] "Where goods are sold in market overt according to the usage of the market the buyer acquires a good title to the goods, provided that he buys them in good faith and without notice of any defect or want of title on the part of the seller." "Market overt" means a public market or fair legally held by grant from the Crown or by prescription, or probably by authority of Parliament.

This exception to the general rule is usually said to be founded on the supposed duty of one whose goods have been lost to search for and claim them in the market place. If he fails to do so, and they are sold there, he loses them by his own negligence and the innocent purchaser ought not to suffer. This explanation of the rule is, however, not a satisfactory reason for its existence. If an owner is to lose his goods by mere negligence in asserting his title, there is no reason for limiting the principle to the particular negligence in question; and further, it ought only to apply to cases where the owner has had a reasonable opportunity of claiming the goods before they are sold, and has not availed himself of his opportunity. But no such limitation has ever been put on the rule. The exception was probably one adopted by the common law from

[1] The title conferred by a factor is a title by estoppel only at common law. The statutory extension of the common law rule is now to be found in the Factors' Act, 1889.

[2] "An Act for codifying the Law relating to the Sale of Goods."

the law merchant, or customary law of merchants, and the reason given for its origin is really only a rather ingenious ground for supporting the custom as reasonable. It was adopted as a common law rule sometime in the 14th, or first half of the 15th century; though even before that time a sale in market overt was recognized as one which ought to give the purchaser more protection than he would derive from a private sale. Thus Bracton, writing in the reign of Henry III of the effect of sale in market overt says: "If a person has bought a stolen article publicly in a market or fair in the presence of the bailiffs or other honest men, thinking it to be purchasable, and has paid toll and customs, even though he cannot produce a warrantor, he shall be set free when he has restored the article to the true owner, but nothing shall be returned to him of the price." Though the sale of the stolen goods in market overt did not confer title, it relieved the purchaser from the consequences of being in possession of stolen property. If they had not been bought in market overt, the purchaser could clear himself by producing a warrantor—*i. e.*, the person from whom he said he bought—and, if the warrantor admitted the sale, the purchaser was set free and the true owner brought his appeal against the warrantor, who in turn might call another warrantor from whom he bought. If the warrantor denied the sale, the issues between them would be tried by battle.[3] Where, however, the sale was in market overt the purchaser could without calling a warrantor, clear himself by restoring the stolen property to the owner.

In the time of Edward I, however, the law merchant was beginning to be recognized as a distinct body of law. It was probably the law administered in Courts of Pie Powder, the courts which every Lord of a Fair or Market was entitled to hold for the settlement of disputes arising within, and during the continuance of the fair or market. It was essential to the effective exercise of this jurisdiction that disputes should be there and then finally disposed of. The court held during the continuance of a fair had no jurisdiction to decide on questions arising out of the transactions of a preceding fair.[4] In such courts the clumsy procedure detailed by Bracton would not be available—and it may be readily assumed that merchants would insist that their title to goods bought in open market should be unimpeachable. It must be remembered

[3] Bracton, Lib. II, Tract 2, Cap. XXXII, f. 150b.

[4] Goodson *v.* Duffield (1612) Cro. Jac. 313.

that markets and fairs (especially the latter) were not mere local markets for the sale of country produce, but were the meeting places of merchants from all parts of the country, and were attended by foreigners to sell their wares and buy the goods of the country. To such men, moving from place to place and knowing nothing of the people with whom they were dealing, the "negotiability" of goods would seem as essential to trade as the negotiability of written promises to pay money, a doctrine which seems to have grown up contemporaneously.[5]

The law as to sale in market overt had been adopted and was well recognized as part of the common law by 1457. In that year there was argued in the Exchequer Chamber an information by the King claiming certain jewels. The defendant pleaded that the jewels had been pledged with him in the City of London and that by the custom of London he was entitled to keep them even against the true owner till they were redeemed by payment of the debt. The custom was held bad, and, in any case, not binding on the King. It may be noticed that the actual decision was only as to the effect of pawning [6] and did not touch the question of sale in market overt. In the course of the argument reference is made by the judges to the law as to sale of goods in market overt, and Prisot (Chief Justice of the Common Pleas) says that "if a man carries away my goods and sells them in market overt, the property by this sale shall be altered; but this is not so unless he pays toll for them" [7], and Fortescue (Chief Justice of the King's Bench) says,[8] "if my goods are carried away by one who sells them in market overt the property is not altered unless he pays toll for them, and if he does not pay toll I can seize them afterwards." How much earlier than this the law was recognized I do not know.

In the reigns of John and Henry III great numbers of grants of markets and fairs were made. Some existed before the Conquest, and there are indications in the few remains we have of Anglo-Saxon law that sales in public markets were encouraged

[5] See Selden Society's Publications, "Select Pleas in Manorial Courts," Vol. II; Professor Maitland's Introduction, p. 133, and the text, p. 152.

[6] The supposed custom as to pawning seems to have died hard, and the intervention of the legislature was finally required to kill it. It was enacted by 1 Jac. I, c. 21, sec. 5, that "no sale or pawn of any goods wrongfully taken or stolen from any person and which at any time shall be sold, pawned or done away with in the City of London * * * to any broker or pawntaker shall work any change of the property" from the true owner.

[7] Y. B. 35 Hen. VI, f. 29. [8] At f. 29 b.

as giving greater security against the theft of personal property. But under the Plantagenets there seems to have been a great increase of trade, and open markets were the places where merchants from all parts of the world gathered to buy and sell, and where the merchant law would be administered. The Charter Rolls, the *Placita de Quo Warranto* and the statutes bear abundant testimony to the rapid increase of business in markets and fairs in this period. The Charter Rolls between the first year of King John and the twenty-second of Edward IV show between 2,500 and 3,000 grants of new fairs or markets or confirmations of old grants. In the case of the *King's Jewels*, above referred to, it was said that in order to change the property in stolen goods it must be shown that toll was paid on the sale, and Prisot[9] says "issue is always taken on the payment." This was, however, denied some 15 years later in the case hereinafter referred to,[10] and it is now well established that the proof that toll has been paid is only necessary in those cases where toll is payable according to the usage of the market. Toll is not incident to a market, and at all times there have been toll-free markets. A grant of a market or fair did not confer a right to take toll, unless toll was expressly mentioned, and in many grants there is no mention of toll. Moreover some persons are, and always were, exempt from paying toll at common law, such as ecclesiastical persons, lords of manors which are ancient demesne, and their tenants, and the King and Queen Consort. There are also exemptions by grant or prescription. Hence the rule as to payment of toll is stated by Coke[11] to be that, "By the common law the property was altered (though some opinions be to the contrary) by sale in market overt albeit no toll was paid, either in respect of the freedom of the fair or market, wherein no toll at all was to be paid, or for that many were discharged of toll, as the King, etc." It could not have been supposed by the judges of Henry VI's time that toll was payable on all sales in market as toll-free markets and exemptions from toll were well known at that time—probably much better than they are now; but for some reason it seems to have been thought that the special benefits attaching to sale in market overt should be confined to those sales on which in fact toll was paid. This idea may perhaps be traced to some lingering memory of the

[9] *Loc. cit.* [10] Y. B. 12 Ed. IV, ff. 8 and 9.
[11] Inst. II, 714.

common law as stated by Bracton. The payment of toll would show that the sale took place, if not in the presence of, at any rate with the cognizance of, the bailiffs of the market.

When the case of the *King's Jewels* was before the Exchequer Chamber reference was made to the custom of London by which every shop in the city is market overt, on all days of the week (except Sundays and holidays) from sunrise to sunset. Most of the judges regarded the custom as impossible. Only a few years before they had insisted in the case of the *Prior of Dunstable* [12], "that a market must be in a public place," and that a butcher of Dunstable could not claim by prescription that a sale in his private shop was a sale in the market. And in the *King's Jewels* case Fortescue, C. J., took the same view of the custom of London. He says: "Those of London claim to have market overt in every shop, *which God forbid*"; and he harangues against the supposed custom as a great mischief and against reason as it would enable anyone to buy stolen goods in his shop privately, and before the owner could claim them, so he would be without remedy. However, 15 years later [13] the custom of the City of London was established, the Court of Common Pleas allowing a plea setting up that "by the Custom of London every day of the week is market overt there and that the property in Stolen Goods passes by sale without payment of toll," and, apparently, though the sale takes place in a shop. This custom has been frequently recognized and defined since that time.[14] It is discussed and its limits are minutely defined by Sir Alfred Wills in the recent case of *Hargreave* v. *Spink*,[15] where it was decided that a sale of jewels to a jeweller in the City of London in a show room over his shop to which customers were only admitted by special invitation was not within the custom. The ground of the decision was that the custom only applies to sales in that part of the shop to which the public are ordinarily admitted, and (*semble*) also on the ground that the sale was to and not by the shopkeeper.

The origin of this curious custom may be explained. In early

[12] Y. B. 11 Hen. VI, j. 19. [13] Y. B. 12 Ed. IV, ff. 8 and 9.

[14] See the case of market overt, 5 Rep. 83, where Coke states the custom as he certified it when he was Recorder of London. The customs of London are not judicially noticed but may be certified by the Recorder *ore tenus* to the Court. See Plummer *v.* Bentham, 2 Burr 248, where the procedure is set forth in detail, even to the robes which the Recorder should put on—viz.: "the purple cloth robe faced with black velvet and not his scarlet gown, his black silk one, nor the common bar gown."

[15] (1892) 1 Q. B. 25.

times daily markets were held in the streets of London for the sale of all kinds of wares, as the names of many of our streets still bear witness. Cheapside and East Cheap were obviously markets. The Poultry, Cornhill, Fish Street, Milk Street and Bread Street tell their own tales. From time to time efforts were made by the city authorities to confine marketing to shops or defined market places. In 3 Edw. II there was a proclamation against holding the market in the highway of "Chepe" "as heretofore they have done." In 19 Edw. III poulterers were forbidden to sell in the Poultry and were ordered to keep to their shops adjoining, and a little later the poulterers were cleared out of Leadenhall Street and the butchers of East Cheap were confined within certain limits. It was natural that the merchants who were forced from the public street-markets into their adjoining shops should maintain that sales in their shops should be treated as sales in the market and should have the same validity as if conducted in open street. In fact this was but one phase of the struggle that was going on in many places throughout the country between the rival claims of shop and market. In some places Lords of Markets claimed to prevent all sales in shops on market and fair days. In others they claimed to treat sales in shops as sales in market, and to take tolls and to exercise the right of supervision therein. Again in Bristol, as in London, the shopkeepers laid claim to a custom to have the benefit of sale in market overt for sales conducted openly in their shops adjoining the market place.[16]

By the 16th Century the present law was well established and since then it has gone under but little change save in respect of the sale of horses. In the 16th Century horse stealing was common and stolen horses were easily got rid of at markets and fairs.[17] The Statute 2 and 3 Ph. and M. c. 7 recites this evil, and that by reason of sales of horses mostly taking place "in houses, stables, backsides and other secret and privie places of markets and fairs" the true owners were deprived of their property without remedy, and enacts that all sales of horses in markets and fairs are to be made publicly and a record of the sales is to be kept by a bookkeeper. These provisions are further elaborated by 31 Eliz. c. 12, and unless all the formalities are complied with the sale does not pass the property in a stolen horse. These statutes are still in

[16] Clifton *v.* Chancellor (1600) B. Mo. 624.

[17] Hollinshead's Chronicles (ed. 1587) Bk. II, Ch. 11.

force and are preserved by the Sale of Goods Act, 1893.[18] Probably the formalities are seldom if ever strictly complied with in practice. The burden of proving that they have been is on the person who claims to have acquired title against the true owner.[19]

There is a curious exception to the rule that a sale of stolen goods in market overt gives title against the true owner. If the thief is prosecuted to conviction by the true owner the property thereupon revests in him notwithstanding any intermediate sale in market overt. It must be noticed that this is strictly a revesting of the property. The sale in market overt vests it in the purchaser, and then the conviction of the thief revests it in the true owner. Accordingly, if whilst the property is vested in the purchaser—*i. e.*, before the conviction of the thief—he parts with the goods or consumes them, the owner has no cause of action against him, even though he does so with notice of the theft.[20] But, of course, even an innocent purchaser, who deals with the goods as his own after the conviction of the thief, is guilty of conversion. The origin of this rule may be found in Stanforde's P. C., Lib. III, c. 10: "Fresh Suit." It seems that after Bracton's time the appeal of theft began to die out, and larcenies began to be prosecuted by the King on indictment. On the conviction of the thief his goods were forfeited to the King, and among these were included the goods which the thief had acquired by theft. If, however, the owner of the goods had prosecuted the felon freshly to conviction, the goods were restored to him by the King's officer, as a reward for his diligence.[21] Now, the law of sale in market overt, having been adopted from the law merchant, and not being originally part of the common law, did not bind the King. It is well established that a sale of the King's goods in market overt does not change the property. Not, as Holtford, B., says,[22] because "the King cannot be bound to come to his markets to claim his goods"; but because the King is not bound by the customs of merchants. Now, as the stolen goods, till the thief is convicted and the property is restored by the King, are the King's goods (they seem to have been regarded as the King's before conviction, his

[18] Sec. 22 (2) "Nothing in this section shall affect the law relating to the sale of horses."

[19] Moran *v.* Pitt (1873) 42 L. J. Q. B. 47.

[20] Harwood *v.* Smith (1788) 2 T. R. 750.

[21] See Pollock and Maitland,. History of English Law, Vol. I, pp. 162 to 164.

[22] Y. B. 35 Hen. VI, j. 28.

title, I suppose, relating back to the theft) the property is not changed by the sale in market overt, and so on conviction the true owner can get restitution notwithstanding any intermediate sale in market overt. This was the interpretation put upon the Statute 21 Hen. VIII c. 11, a statute passed to remedy *procedure* by enabling justices to grant writs of restitution. The provisions of that act were continued and amplified by sec. 100 of the Larceny Act, 1861, which enables the Court on conviction of the thief upon an indictment by or on behalf of the owner of the goods to award writs of restitution, or order restitution of the property in a summary manner.[23] But even without a writ or order for restitution, "where goods have been stolen and the offender is prosecuted to conviction the property in the goods so stolen revests in the person who was the owner of the goods or his personal representative notwithstanding any intermediate dealing with them whether by sale in market overt or otherwise." [24] It is noticeable that in this statement of the law it is not required that the thief should have been prosecuted by or on behalf of the owner. And this accords with the ancient rule that by whomsoever the thief has been prosecuted the property revests on conviction; and if the prosecution has been undertaken by or on behalf of the owner the Court may make a summary order for restitution. The reason for the rule, however, no longer exists. Forfeiture to the Crown on conviction of felony has been abolished,[25] but sec. 7 of the Forfeiture Act and sec. 24 (2) of Sale of Goods Act together preserve to the true owner the benefit he formerly got from his goods being temporarily the property of the King and so protected from the consequences of a sale in market overt. In later cases the temporary vesting of the property in the King has been overlooked. Thus in *Harwood* v. *Smith*,[26] Lord Kenyon says, "During the interval between the felony and the conviction, the property remains *in dubio*, liable to be defeated by the attainder." In *Peer* v. *Humphrey* [27] Lord Denman criticized this statement, and the Court of Queen's Bench held that the property remains in the original owner until it is sold in market overt, and that the sale gives "a *prima facie* title" to the purchaser, which is divested on the conviction of the thief. Hence a person who buys

[23] See Bentley *v.* Vilmont (1887) 12 App. Cas. 471.
[24] Sale of Goods Act, 1893, sec. 24 (1).
[25] The Forfeiture Act, 1870. [26] *Supra.*
[27] (1835) 2 A. & E. 495.

not in market overt from the thief, and then sells in market overt, is liable to the true owner in an action of trover, the sale by him being a conversion, though the purchaser from him gets title. It seems curious that the true owner should have a right not only to have his property revested in him by the conviction of the thief, but should have also a remedy in damages against persons who have sold them in market overt. Would a judgment against the seller with satisfaction vest the property in the seller, according to the ordinary rule? And, if so, would the subsequent conviction of the thief vest the property in him or revest it in the original owner?

The present law as declared in the Sale of Goods Act, 1893, is the law as established by the time of Coke. Since that time the Courts have not extended, nor are they likely in future to extend, its application, and the tendency of all the later cases has been to keep it within the narrowest limits consistent with the actual decisions before the 17th century. Meanwhile, the analogous doctrine of the negotiability of instruments has made sturdy growth. It is the foundation of the whole of the modern law of bills of exchange and promissory notes, and has been frequently applied to new kinds of documents recognized by merchants as negotiable.

J. G. PEASE.

LONDON, England.